Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–710 OF 2003 AND W-02–711 OF 2003
MOHD GHAZALI, ABU SAMAH AND SULAIMAN DAUD JJCA
26 FEBRUARY 2009

Civil Procedure — Committal proceedings — Application for — Leave of court — Application against liquidator — Whether liquidator committed contempt of court — Whether leave of winding up court required

The two appeals were against the decision by trial judge allowing applications by a liquidator for the first respondent and the second respondent to set aside an ex parte order granting leave to the appellant to apply for issue of order of committal against the liquidator and the second respondent. The first respondent was wound up under s 218(1)(i) of the Companies Act 1965 ('the Act') vide petition presented by the appellant and a liquidator was appointed pursuant to the winding-up order. Subsequently, the appellant applied to remove the liquidator, alleging that the liquidator had failed to carry out a proper investigation in relation to the first respondent's beneficial ownership of three pieces of land ('Tuallang lands') registered under the Tanjong Tin Dredging Malaysia Sdn Bhd ('TTDM'). The first respondent owned all the shares of TTDM at the material time. However, the application to remove the liquidator was dismissed and the matter was pending appeal before this court. Following that, the appellant filed an ex parte application pursuant to O 52 r 2 of the Rules of the High Court 1980 ('RHC') for leave to issue a committal proceedings against the liquidator and the second respondent for their failure to bring to the knowledge of the court the existence of the first respondent's beneficial interest in the Tuallang lands. The appellant argued, inter alia, that the liquidator and the second respondent had affirmed affidavits, either personally and/or on their behalf that the first respondent had no beneficial interest in the Tuallang lands and that the liquidator had committed contempt of court by failing to conduct any investigation on the existence of the Tuallang lands. The leave application for committal proceedings was allowed against the liquidator and the second respondent by the trial judge. However, due to the appellant's failure to obtain leave of the court before the proceedings against the liquidator and the second respondent who were officers of the court, the learned trial judge had set aside the appellant's ex parte application. The appellant contended that since the committal proceeding against the liquidator and second respondent was an

ancillary proceedings originating from pre-existing proceeding filed in the court, a separate leave application was not necessary. A

Held, dismissing the appeals with costs:

(1) Prior leave from the court was required before the appellant could make any application for leave under O 52 r 2 of the RHC against the liquidator, he being an officer of the court. It was clear that the appellant was not armed with such leave when he made the application against the liquidator (see para 18). B C

(2) Leave of the winding up court was required when the proposed action against a liquidator was pursued in another court other than the winding up court. Whether the purported action against the liquidator was in another court or the winding up court is irrelevant. The liquidator had yet to be released or has yet to apply to court for an order that he be released and that the company be dissolved. Pending that, the liquidator was still an officer of the court and any proposed action against him by the petitioner as in this case for any alleged wrongdoing would still need the sanction of the winding-up court. As such the learned trial judge was correct in setting aside the said ex parte order obtained against the liquidator (see paras 14 & 19). D E

(3) The appellant had failed to show that he had a prima facie case against the second respondent to justify the grant of leave pursuant to O 52 r 2 of the RHC. The alleged omission in the affidavit on behalf of the second respondent, affirmed by one Cyril Gomez on behalf of the second respondent to the fifth respondents, in relation to the Tuallang lands would be enough to justify a contempt charge or even be sufficient to draw inference against the second respondent. 'The requirements that have to be considered by the court in determining the question as to whether a statement was intended to be false or misleading and whether it was made with actual or inevitable intent or consequences of frustrating or obstructing the administration of justice had been adopted by the court as summarised in *Edmund Ming Kwan @ Kwan Yee Ming, Edmund v Extra Excel (M) Sdn Bhd & Ors (Part 2)* [2007] 7 MLJ 276 (see paras 11, 25, 27 & 29). F G H

(4) In the circumstances, the appeal had no merit and the learned trial judge had exercised her decision judiciously and was correct in setting aside the ex parte order for leave against the second respondent as provided under O 32 r 6 of the RHC (see paras 19 & 30). I

[Bahasa Malaysia summary

Kedua-dua rayuan ini adalah terhadap keputusan hakim bicara yang

membenarkan permohonan-permohonan seorang likuidator bagi responden pertama dan kedua untuk mengenepikan suatu perintah ex parte, membenarkan perayu memohon suatu perintah komital terhadap likuidator dan responden kedua. Responden pertama digulung di bawah s 218(1)(i) Akta Syarikat 1965 ('Akta tersebut') melalui petisyen yang dimasukkan oleh perayu dan seorang likuidator dilantik berikutan perintah penggulungan tersebut. Selepas dari itu, perayu memohon untuk menyingkirkan likuidator tersebut, mendakwa bahawa likuidator gagal menjalankan siasatan yang sempurna berkaitan keempunyaan benefisial responden pertama atas tiga keping tanah ('tanah Tuallang') didaftarkan di bawah Tanjong Tin Dredging Malaysia Sdn Bhd ('TTDM'). Responden pertama memiliki semua saham TTDM pada masa yang material tersebut. Namun, permohonan penyingkiran likuidator itu ditolak dan hal perkara itu sedang menunggu rayuan di mahkamah ini. Berikutan daripada itu, perayu memfailkan permohonan ex parte di bawah A 52 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk suatu kebenaran bagi prosiding komital terhadap likuidator dan responden kedua kerana gagal memaklumkan pihak mahkamah tentang kewujudan keempunyaan benefisial responden pertama atas tanah Tuallang. Perayu berhujah bahawa, inter alia, likuidator dan responden kedua mengakujanji afidavit-afidavit, sama ada secara individu dan/atau bagi pihak mereka, mengatakan bahawa responden pertama tiada keempunyaan benefisial atas tanah Tuallang, dan juga likuidator telah menghina mahkamah apabila gagal menjalankan sebarang siasatan atas kewujudan tanah Tuallang tersebut. Kebenaran bagi permohonan prosiding komital terhadap likuidator dan responden kedua diberikan oleh hakim bicara. Walau bagaimanapun, akibat kegagalan perayu mendapatkan kebenaran daripada mahkamah sebelum prosiding terhadap likuidator dan responden kedua tersebut dimulakan, yang mana mereka merupakan pegawai-pegawai mahkamah, hakim bicara yang bijaksana telah menolak permohonan ex parte perayu. Perayu menyatakan bahawa memandangkan prosiding komital terhadap likuidator dan responden kedua merupakan prosiding sampingan yang wujud berikutan daripada prosiding sedia ada yang telah difailkan di mahkamah, suatu permohonan untuk kebenaran secara berasingan tidaklah perlu.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Keizinan awal daripada mahkamah diperlukan sebelum perayu boleh membuat permohonan untuk kebenaran di bawah A 52 k 2 KMT terhadap likuidator, kerana dia merupakan pegawai mahkamah. Adalah jelas bahawa perayu tidak mendapat keizinan tersebut apabila dia membuat permohonan terhadap likuidator (lihat perenggan 18).

(2) Keizinan daripada mahkamah penggulungan diperlukan apabila suatu

tindakan cadangan terhadap likuidator dimulakan di mahkamah yang lain. Sama ada tindakan yang dimaksudkan terhadap likuidator itu dimulakan di mahkamah lain atau di mahkamah penggulungan yang sama tidak relevan. Likuidator tersebut belum lagi disingkirkan atau masih belum memohon kepada mahkamah untuk suatu perintah agar dia dilepaskan dan syarikat tersebut dibubarkan. Sementara itu, likuidator tersebut masih lagi merupakan pegawai mahkamah dan sebarang cadangan tindakan terhadapnya oleh pempetisyen, seperti dalam kes ini, bagi sebarang dakwaan kesalahannya, masih memerlukan keizinan daripada mahkamah penggulungan. Oleh itu, hakim bicara yang bijaksana memutuskan dengan tepat apabila menolak perintah ex parte terhadap likuidator tersebut (lihat perenggan 14 & 19).

(3) Perayu gagal menunjukkan bahawa dia mempunyai kes prima facie terhadap responden kedua untuk menjustifikasikan pemberian kebenaran tersebut di bawah A 52 k 2 KMT. Butiran-butiran yang dikatakan tidak dimasukkan dalam afidavit bagi pihak responden kedua tersebut, diakujanji oleh Cyril Gomez bagi pihak responden kedua dan kelima, berkenaan tanah Tuallang, adalah mencukupi untuk menjustifikasikan tuduhan menghina mahkamah atau pun cukup untuk membuat kesimpulan terhadap responden kedua. Keperluan-keperluan yang harus dipertimbangkan oleh mahkamah dalam menentukan persoalan sama ada sesuatu pernyataan adalah bertujuan untuk mengelirukan atau bersalahan dan sama ada pernyataan tersebut dibuat dengan niat sebenar atau tidak dapat dielakkan atau mengakibatkan kegagalan atau menghalang perlaksanaan keadilan telah diguna pakai oleh mahkamah seperti yang dirumuskan dalam kes *Edmund Ming Kwan @ Kwan Yee Ming, Edmund v Extra Excel (M) Sdn Bhd & Ors (Part 2)* [2007] 7 MLJ 276 (lihat perengan 11, 25, 27 & 29).

(4) Dalam keadaan-keadaan ini, rayuan ini tiada merit dan hakim bicara yang bijaksana telah menyampaikan keputusannya dengan bijaksana dan membuat keputusan yang tepat apabila menolak perintah ex parte bagi suatu kebenaran terhadap responden kedua seperti yang terdapat dalam A 32 k 6 KMT (lihat perenggan 19 & 30).]

Notes

For cases on application for committal proceedings, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1675–1676.

Cases referred to

Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow [1995] 3 MLJ 204, CA (refd)

Edmund Ming Kwan @ Kwaun Yee Ming, Edmund v Extra Excel (Malaysia) Sdn Bhd & Ors (Part 2) [2007] 7 MLJ 276, HC (folld)

A *Maidstone Palace of Varieties, Ltd Blair v Maidstone Palace of Varieties, Ltd, In re* [1909] 2 Ch 228 (refd)

Zainal Abidin Putih & Anor v Chen Wan Development Sdn Bhd [1992] 2 MLJ 233, SC (refd)

B **Legislation referred to**

Companies Act 1965 ss 181, 218(1)(i), 236(3)

Rules of the High Court 1980 O 52 r 2

C **Appeal from**: Civil Appeal No W-02–711 of 2003 (Court of Appeal, Putrajaya)

Lim Kian Leong (Ong Chee Kwan and Tan Keng Teck with him) (Lee Ong & Kandiah) for the appellant.

D *Tan Hock Chuan (Cains Tan with him) (Tan Hock Chuan & Co) for the first respondent.*

M Nagarajah (Sudesh Singh with him) (Shook Lin & Bok) for the second respondent.

E **Mohd Ghazali, Abu Samah and Sulaiman Daud JJCA:**

[1] There are two appeals before the court. The appeals are against the decision of Zainun Ali J (as she then was) in allowing the applications of the
F liquidator of Tien Ik Enterprises Sdn Bhd, the first respondent and David Kuok Khoon Hin, the second respondent to set aside an ex parte order granting leave to apply for issue of order of committal against them.

THE BACKGROUND

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[2] The first respondent was wound up on 9 June 1994 under s 218(1)(i) of the Companies Act 1965 ('the Act') vide Winding Up Petition No D2–28–187 of 1990 presented by Woodsville Sdn Bhd, ie the appellant.

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[3] Pursuant to the aforesaid winding up order, Gong Wee Ning (hereafter referred to as 'the liquidator') was appointed as one of the liquidators for the first respondent.

I **[4]** On 10 August 1998 the appellant filed an application for an order to remove the liquidator (hereafter referred to as 'the removal application'). One of the grounds raised by the appellant to support the removal application was on an allegation that the liquidator has failed to carry out a proper investigation in relation to the first respondent's beneficial ownership of three

pieces of land, the particulars of which are as follows:

(a) Certificate of Title No 8864;

(b) Lease of State Land Title No 1395; and

(c) Lease of State Land Title No 1020.

(hereafter referred to as 'the Tuallang lands') which were then registered in the name of a locally incorporated company known as Tanjong Tin Dredging Malaysia Sdn Bhd ('TTDM'). At the material time the first respondent owned all the shares of TTDM.

[5] The removal application was dismissed by the court on 31 May 2000 and is now pending appeal before this court.

[6] On 20 April 2001, the appellant filed an ex parte application pursuant to O 52 r 2 of the Rules of the High Court 1980 ('the Rules') for leave for issue of committal proceedings against the liquidator and David Kuok Khoon Hin, ie the second respondent (hereafter referred to as 'David Kuok') who was at the material time a member of the committee of inspection appointed to act with the liquidator, for their failure to disclose and or concealing to the court the existence of the first respondent's beneficial interest in the Tuallang lands.

[7] The grounds of the application for leave for issue of committal proceedings were that the liquidator and David Kuok have affirmed affidavits, either personally and or on their behalf and filed in the removal application, wherein they stated that the first respondent has no beneficial interest in the Tuallang lands. It is alleged that the statements made by each of them were untrue and that they knew and or ought to have known as untrue. It is further alleged that the liquidator and David Kuok failed to disclose the true position of the Tuallang lands in the removal application even after they found out the existence of the Tuallang lands and that the beneficial interest of the same vest in the first respondent. It is finally alleged that the liquidator had committed contempt of court by failing to conduct any investigation on the existence of the Tuallang lands.

[8] The application for leave sought issue of committal proceedings against the liquidator and David Kuok was allowed by the learned judge on 22 June 2001.

[9] On 6 August 2001, the liquidator filed an application by way of notice of motion (encl 230) to set aside the said ex parte order granted against him. Subsequently on 11 October 2001 David Kuok made a similar application

(encl 236). Both applications to set aside the said ex parte orders were allowed by the learned judge on 24 July 2003 and hence, these appeals.

[10] In allowing the liquidator's application to set aside the said ex parte order, the learned judge said that following *Zainal Abidin Putih & Anor v Chen Wan Development Sdn Bhd* [1992] 2 MLJ 233, 'there has to be leave of court before proceeding against liquidators and receivers' and that this requirement 'cannot be ignored since these are officers of the court'. As the appellant has not obtained such leave, the learned judge allowed the liquidator's application and set aside the said ex parte order against him.

[11] The learned judge's grounds for allowing David Kuok's application to set aside the said ex parte order against him were as follows:

(a) David Kuok did not affirm any affidavit in the removal application; the only affidavit that was filed was affirmed by one Cyril Gomez on behalf of David Kuok and the third to the fifth respondents (who are not parties to these appeals);

(b) Cyril Gomez did not in his affidavit make any positive averment that TTDM did not own the Tuallang lands and that 'this omission is not quite the same as it being a positive assertion of this fact'; and

(c) there is also non-disclosure of material facts by the appellant, namely, the appellant did not inform the court that it has filed an appeal to this court in relation to the removal application.

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[12] Before us, learned counsel for the appellant argued that the learned judge erred in law in deciding that the appellant was required to initiate a separate and distinct leave application from the court before filing the ex parte application for leave for issue of committal proceedings against the liquidator.

[13] Counsel for the appellant contended that since the committal proceeding is an ancillary proceeding which originate from the pre-existing proceedings filed in court, the appellant is not required by law to file a separate leave application for the purposes of initiating committal proceedings against the liquidator. Counsel then argued that the contempt committed by the liquidator arose in his capacity as a deponent of an affidavit and not in his official capacity as liquidator for the first respondent. He submitted that s 236(3) of the Act which was discussed in *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204 is not applicable in this case. Section 236 of the Act provides for powers of liquidator and s 236(3) reads:

> The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

Counsel argued that s 236(3) of the Act has no bearing on the appeal before us. He contended as follows:

> This present appeal is not brought against the liquidator in respect of the exercise of his powers under s 236. Rather, it is brought against the liquidator for filing misleading affidavits in the appellant's removal application and also deliberately (as admitted by him, albeit legal advice) suppressing evidence (by refusing to inform the honourable High Court on his discovery that the Tuallang lands were beneficially owned by the first respondent). The issue of the existence and ownership of the Tuallang lands was very much a live issue in the removal application.

[14] In the course of canvassing his arguments, counsel for the appellant referred to the case of *In re Maidstone Palace of Varieties, Ltd Blair v Maidstone Palace of Varieties, Ltd* [1909] 2 Ch 228 and contended that leave of the winding-up court is required only when the proposed action against a liquidator is pursued in another court other than the winding up court. In that case Neville J said (at p 286) that the court 'will not allow its officers to be subject to an action in another court with reference to his conduct in the discharge of the duties of his office, whether right or wrong'. His grounds of judgment reads:

> In this case the applicant is a receiver appointed by this court in a debenture-holders' action, and by virtue of that appointment he has had the management of the theatre known as the Maidstone Palace of Varieties. In the course of that management he made use of certain plant which is claimed by the respondent company as their property. They say that he had no right to use it except on the terms of paying them a rent, and they claim a considerable sum. It appears to me that a dispute of that kind is one which, as is shewn by *Aston v Heron* (2 My & K 890), the court will deal with itself, and that it will not allow its officer to be subject to an action in another court with reference to his conduct in the discharge of the duties of his office, whether right or wrong. The proper remedy for any one aggrieved by his conduct is to apply to this court in the action in which he was appointed. If any wrong has been done by the officer, the court will no doubt see that justice is done, but no one has a right to sue such an officer in another court, without the sanction of this court. The present application is accordingly right in form. The respondents must therefore bring in their claim in the debenture-holders' action within fourteen days, and must be restrained from commencing any other proceedings against the receiver.

[15] In opposing the appeal, learned counsel for the liquidator contended, inter alia, that leave is required not only when misconduct of a liquidator is in issue but in any proceeding against a liquidator who is an officer of the

court. To support his contention counsel referred to the case of *Zainal Abidin Putih*. In that case, the respondent had obtained an order against the Co-operative Central Bank Bhd ('CCB') for the return of documents of titles of properties charged and for costs. The respondent consequently brought an action against the appellants, who had been appointed the receivers of CCB, for payment of the costs of the first action. The learned judge of the High Court ordered the appellants to pay the said costs. The appellants appealed. In the allowing the appeal, the Supreme Court held that the appellants were appointed receivers by the High Court and as officers of the court, leave of the court should have been obtained to proceed against them in the court action. In delivering the judgment of the court, Gunn Chit Tuan SCJ (as he then was) said (at p 241):

> We would start off by pointing out that the appellants were appointed receivers by the court and are therefore first and foremost officers of the court, and to use the words of Viscount Haldane LC in *William H Parsons & Ors v The Sovereign Bank of Canada* [1913] AC 160) 'put in to discharge certain duties prescribed by the order appointing him'. In the present case, the appellants were appointed by the High Court under sub-para (c) of para (1) of reg 9 of the Essential (Protection of Depositors) Regulations 1986, which reads as follows:
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> > ... to manage the affairs and property of the deposit-taker and for such incidental or ancillary orders or directions in relation to such appointment as may, in the opinion of the Central Bank, be necessary or expedient:
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> The deposit-taker in this case, ie the Co-operative Central Bank Bhd, remains in existence but has lost its title to control its assets and affairs. As the appellants were appointed by the court and are responsible to it and cannot obey the directions of the parties in the action, they do not stand in the position of agents to the parties who are interested at the suit of whom they are appointed (*Corporation of Bacup v Smith* (1890) 44 Ch D 395) at p 398 per Chitty J). But the important point in this case was that as the appellants are officers of the court, leave of the court should have obtained to proceed gainst them in the second originating summons and the case of *Re Maidstone Palace of Varieties Ltd* [1909] 2 Ch 283) was correctly cited by counsel for the appellants in support of his submission that leave of the court was necessary. Unfortunately the preliminary objection of counsel in the lower court was overruled by the learned judge for if His Lordship had upheld that preliminary objection, then the further prosecution of the second originating summons should have been restrained and dismissed with costs if leave was not obtained.

[16] Counsel for the liquidator also referred to *Chi Liung Holdings Sdn Bhd*, a decision of this court. In that case, a company had signed a tenancy agreement with the applicant in respect of certain premises. The agreement provided the company with an option to purchase in the event that the owner intends to sell the premises. Subsequently, the company gave notice of its intention to exercise the option but the applicant did not immediately

respond. Consequently the applicant gave notice to the company to vacate the premises by 1 August 1989. By that time, there was already a petition filed to wind up the company. On 19 December 1989, the liquidator handed over the premises to the applicant. The applicant is now claiming arrears of rental from the liquidator. The liquidator, in turn, claimed the refund of deposit.

[17] The issue before the trial court was whether the applicant was entitled to forfeit the deposit towards payment of the arrears of rental and whether the applicant could claim for the arrears from the liquidator. The court dismissed the applicant's originating motion because s 226(3) of the Act which provides for obtaining leave of the court had not been complied with. The applicant appealed to this court. Section 226(3) of the Act reads:

> When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:
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> (a) by leave of the court; and
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> (b) in accordance with such terms as the court imposes.

The issue before this court was whether leave of the court was necessary before the applicant could commence his originating motion against the liquidator personally. This court agreed with the trial judge that the originating motion required the leave of the court before it could be brought, but not for the reasons found by the trial judge. This court held that under s 236(3) of the Act (reproduced earlier) it is clear that the liquidator, having been appointed by the court, is an officer of the court and thus leave of the court is needed before an action is commenced against him and officers like him. In delivering the judgment of this court, Abu Mansor Ali JCA said (at p 207):

> We would cite the legal position of receivers who are in the same position as officers of court. In the text book the *Law Relating to Receivers, Managers and Administrators* by Hubert Picarda at p 339 the learned author wrote:
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> A receiver, in the words of Viscount Haldane LC, 'is an officer of the court put in to discharge certain duties prescribed by the order appointing him'.... He is 'nothing more than the hand of the court'.... for the purpose of holding the property of the litigants, ... and the possession of the receiver is simply the possession of the court.
>
> Then at p 373 of the textbook *Law of Receivers* by PS Atchuthen Pillai (2nd Ed) the author wrote in para 27:
>
> 27. Suit without leave is contempt of court and will be dismissed. A suit against a receiver when filed without leave of court is liable to be dismissed ...

> Institution of proceedings against a receiver without leave of the court is contempt of court. It is incompatible with the dignity and authority of the court to allow its officer to be summoned before any tribunal ...
>
> As we have stated we were unanimous that the applicant should have obtained leave before making his application below, for the attitude of a winding up court has been that some form of leave is required.

The learned judge then said (at p 210):

> While we agree that the applicant may proceed against the liquidator, we are however, firmly of the view the procedure is that the applicant must have first obtained authority from the winding up judge before proceeding against the liquidator and not, as was done here, proceeded independently to prevent unnecessary and wasteful litigation.

[18] We would agree with the submission of learned counsel for the liquidator. Upon perusing the authorities referred to earlier, we are of the unanimous view that prior leave from the court is required before the appellant can make any application for leave under O 52 r 2 of the Rules as against the liquidator, he being an officer of the court. It is clear that the appellant was not armed with such leave when he made the application against the liquidator.

[19] As discussed earlier, learned counsel for the appellant in referring to *In re Maidstone Palace of Varieties Limited*, argued that leave of the winding up court is required only when the proposed action against a liquidator is pursued in another court other than the winding up court. We do not agree with counsel's proposition. Whether the purported action against the liquidator is in another court or the winding up court is irrelevant. In the instant case the appellant alleged that the liquidator has committed contempt of court by failing to conduct any investigation on the existence of the Tuallang lands as a result of which it is initiating committal proceedings against the liquidator in the course of the winding up of the first respondent. The liquidator has yet to be released or has yet to apply to court for an order that he be released and that the company be dissolved. Pending that, he is still an officer of the court and any proposed action against him by the petitioner as in this case for any alleged wrongdoing will still need the sanction of the winding up court. As such, we are of the view that the learned judge was correct in setting aside the said ex parte order obtained against the liquidator. On this ground alone, we would dismiss the appeal by the appellant with costs. We would also order that the deposit be remitted to the liquidator to account of taxed costs.

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[20] This appeal is against the decision of the learned judge in allowing the

application of David Kuok to set aside the said ex parte order obtained against him pursuant to O 52 r 2 of the Rules as discussed earlier. It is common ground that the issue of any requirement for separate leave as in the case of the liquidator does not arise here.

[21] In canvassing this appeal, learned counsel for the appellant contended that at all material times, David Kuok was fully aware of the first respondent's beneficial interest in the Tuallang lands. He also pointed out that David Kuok was fully appraised of the removal application and that one of the grounds relied by the appellant in that application was David Kuok's failure to carry out investigations into the ownership of the Tuallang lands.

[22] With regards to the issue raised by David Kuok that he never affirmed any affidavit in opposing the removal application, counsel for the appellant pointed out that in the affidavit affirmed by Cyril Gomez, the latter stated that he was duly authorised to affirm the affidavit on behalf of the second to the fifth respondents; that would include David Kuok. Counsel then submitted that in his affidavit, Cyril Gomez categorically adopted the averments made by the liquidator who denied the appellant's assertion as to the existence and beneficial ownership of the Tuallang lands by the first respondent. Counsel argued that it is trite that a person who authorises a deponent to affirm an affidavit on his behalf is bound by the contents of such an affidavit and by reason of the aforesaid, David Kuok is bound by the contents of the affidavit affirmed by Cyril Gomez in opposing the removal application.

[23] Counsel for the appellant further pointed out that it is pertinent to note that during the course of the removal application, David Kuok did not make any attempt to correct the averments made by Cyril Gomez in the latter's affidavit and to disclose to the court that the Tuallang lands were beneficially owned by the first respondent even though David Kuok was fully aware that the existence and ownership of the Tuallang lands was a live issue in the removal application. Counsel then submitted that David Kuok's contention that he did not mislead the court on the ground that the offending affidavit was filed by Cyril Gomez is totally misconceived as David Kuok was fully aware that the court was considering the issue of ownership of the Tuallang lands to determine whether there was misconduct by the liquidator.

[24] Counsel for the appellant concluded that David Kuok's decision not to disclose this vital information, viz, the existence and ownership of the Tuallang lands before the delivery of the decision on the removal application is a deliberate obstruction of justice and a calculated act to demean the

integrity of the court which is tantamount to misconduct in the face of the court and therefore David Kuok has committed contempt of court.

[25] In opposing this appeal, learned counsel for David Kuok submitted that if all the cause papers relating to the removal application were disclosed in the said ex parte application for leave, the facts would show that there is no prima facie evidence of contempt against David Kuok. Counsel then referred to the case of *Edmund Ming Kwan @ Kwaun Yee Ming, Edmund v Extra Excel (Malaysia) Sdn Bhd & Ors (Part 2)* [2007] 7 MLJ 276. That case relates to an application by a petitioner in a petition presented under s 181 of the Act for leave to make an application for an order of committal for contempt of court against the second and fourth respondents on the grounds that the second respondent had willfully and intentionally made false and misleading statements in his affidavits and against the fourth respondent for affirming an affidavit wherein he adopts the contents of the second respondent's affidavits and for authorising the second respondent to affirm certain affidavits. In dismissing the application, Vincent Ng J (as he then was) said (at pp 281–282):

> On the question whether the statement was intended to be false and misleading (mens rea) and whether it was made with actual or inevitable intent or consequence of frustrating or obstructing the administration of justice, the court would have to: (i) firstly, look at the relationship between the alleged false statements and the issues to be decided in the main proceedings (see *Keeley v Brooking* (1979) 25 ALR 45); (ii) secondly, bear in mind that unlike the offence of perjury, contempt requires the actual or inevitable intent or consequence of frustrating or obstructing the administration of justice (see *Jaginder Singh & Ors v Attorney-General* [1983] 1 MLJ 71, *Coward v Stapleton* (1953) 90 CLR 573, *Re Bride ex parte Steward* [1948] WB 455, *R v Christopher Charles Murfett* [2004] VSC 160 and *Halsbury's Laws of England,* 4th Ed Vol 9(1) pp 242–243; (iii) thirdly, be mindful that a 'mere falsity of evidence is not enough to justify a contempt charge' (see *Yee Sang Metal* [2002] HKCU 1255); and, (iv) fourthly, be slow to draw inferences from affidavits as to the bona fides or mala fides of the alleged contemnor (see *In re Smith and Fawcett Ltd* [1942] Ch 304).

[26] Counsel for David Kuok pointed out that the appellant had, in para 4.1.5 of its statement pursuant to O 52 r 2(2) of the Rules filed in the course of the ex parte application for leave for issue of order of committal, alleged as follows:

> Even assuming that the second respondent had only discovered the Tuallang lands in October and or November 1998 (which is denied), the second respondent failed and or omitted to disclose to this honourable court the existence of the Tuallang lands and to file an affidavit at the earliest opportunity correcting his earlier position that such lands did not exist. The fact is that the second respondent did not disclosed to or concealed from the Liquidator and to this honourable court

that TTDM belongs to the company and that he and or with other respondents continue to control and manage the same.

[27] Counsel for David Kuok then submitted that following the case of *Edmund Ming Kwan*, the relationship of the alleged false statement and the issues to be decided in the removal application has to be considered. However, he pointed out that David Kuok did not affirm any affidavit in the removal application. He also pointed out that the impugned affidavit was affirmed by Cyril Gomez for and on behalf of not only David Kuok but also for the third to the fifth respondents. Further, Cyril Gomez did not make any averment that TTDM did not own the Tuallang lands and hence there was nothing to correct. As such, counsel submitted that it is fallacious to suggest that Cyril Gomez or David Kuok through Cyril Gomez confirmed the non-existence of the Tuallang lands.

[28] In conclusion counsel submitted that the said ex parte order for leave to commence committal proceedings against David Kuok were devoid of evidence and merits and hence the learned judge was right to have set aside the order that she granted.

[29] We agree with the submission of learned counsel for David Kuok. We find that the appellant has failed to show that he has a prima facie case against David Kuok to justify the court to grant leave pursuant to O 52 r 2 of the Rules. We do not think that the alleged omission in the affidavit of Cyril Gomez in relation to the Tuallang lands and which affidavit was made, inter alia, on behalf of David Kuok would be enough to justify a contempt charge or even be sufficient to draw inferences against David Kuok. We fully adopt the requirements that have to be considered by the court in determining the question as to whether a statement was intended to be false or misleading and whether it was made with actual or inevitable intent or consequence of frustrating or obstructing the administration of justice as summarised by Vincent Ng J in *Edmund Ming Kwan*.

[30] We find no merits in this appeal. We are of the view that the learned judge was correct in setting aside the ex parte order for leave against David Kuok. Order 32 r 6 of the Rules provides that the court may set aside an order made ex parte. We find that the learned has exercised her discretion judiciously and hence find no reason to disturb her decision. As such, we hereby dismiss this appeal with costs and order that the deposit be remitted to the second respondent to account of taxed costs.

Appeals dismissed with costs.

Reported by Mashrifah Ravendran